

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2004-32

September 27, 2004

MAINE PUBLIC UTILITIES COMMISSION  
Investigation of Business Options

ORDER IMPOSING  
ADMINISTRATIVE PENALTY

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

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**I. SUMMARY**

In this Order, we impose an administrative penalty of \$750,000 on Business Options, Inc. (BOI) for numerous violations of Maine's unauthorized carrier change laws and regulations. In addition, we revoke BOI's certificate to operate as a telecommunications carrier in Maine.

**II. PROCEDURAL BACKGROUND**

On January 23, 2004, the Commission's Prosecutorial Staff (Staff) filed a Prosecutorial Report (Report) stating that BOI had violated 35-A M.R.S.A. § 7106 and Chapter 296 of the Commission's rules by making 195 unauthorized carrier changes. Specifically, the Report stated that:

BOI used deceptive tactics in its marketing and third-party verification (TPV) procedures to induce Maine consumers to either unknowingly consent to a change in their intrastate toll carrier or to provide personal information which was used to make the change in carrier without the consumer's express consent. BOI marketing personnel intentionally misrepresented themselves to Maine consumers, many of whom were elderly, to mislead consumers into believing that they were speaking to Verizon or AT&T personnel (rather than BOI personnel) and that "Business Options" was merely a calling plan offered by Verizon or AT&T to good customers who paid their bills on time.

The Report also indicated that the Commission's Consumer Assistance Division (CAD) had received 183 complaints of slamming against BOI and had made findings of slamming in 167 of those complaints.

Because of the unusually high number of complaints and the deceptive practices it believed BOI used, Staff requested that the Commission assess an administrative penalty of \$750,000 pursuant to 35-A M.R.S.A. § 7106. Staff's recommended penalty was based on BOI's carrier change activity with respect to ten specific customers. Staff also requested that the Commission revoke BOI's certificate to operate in Maine and refer the matter to the Attorney General's Office for possible criminal prosecution.

On February 3, 2004, the Commission, pursuant to 35-A M.R.S.A. §§ 1303(2) and 7106, initiated an investigation into the violations of statutes and rules alleged in the Staff Report. The Commission also indicated that the investigation would include consideration of all appropriate sanctions including, but not limited to, administrative penalties to the full extent authorized in 35-A M.R.S.A. § 7106, and the revocation of BOI's authority to provide service in Maine.

The Hearing Examiner assigned to this proceeding issued an Order establishing a procedural schedule. The procedural schedule included an opportunity for discovery and dates for an evidentiary hearing. On April 29, 2004, BOI filed a Notice of Withdrawal from Proceedings and Surrender of Certificate. In this filing, BOI stated that it lacked the resources necessary to present an adequate defense to the allegations set forth in the Prosecutorial Report and that it would not participate further in the proceeding.

On July 7, 2004, the Commission held a hearing in this matter. During the hearing, Staff presented the following witnesses: Derek Davidson, Director of the CAD; Mary James, Assistant Director of the CAD; Helen Osborne; and Patricia Anderson. Mr. Davidson and Ms. James testified to the Staff's investigation of BOI. Ms. Osborne and Ms. Anderson both testified that their telephone service had been changed to BOI without their authorization. Staff also submitted into evidence the Prosecutorial Report.

### **III. LEGAL REQUIREMENTS**

Chapter 296 of the Commission's rules requires carriers to obtain customer authorization and to verify that authorization (in writing, electronically, or orally) prior to making a carrier change. If the customer is switching more than one service (both interstate and intrastate toll) the carrier must obtain separate authorization, by asking separate questions for each service that will be switched.

In the event the verification is oral, it must be conducted by a qualified, independent third-party verifier. The verifier must inform the customer that the customer is authorizing a change in telecommunications carriers and provide the identity of the new carrier. The verifier may not be owned, managed, controlled or directed by the carrier or have any financial incentive to confirm change orders and must operate in a location physically separate from the carrier or its marketing agent.

The statute (35-A M.R.S.A. § 7106) authorizes the Commission to impose administrative penalties against any person that initiates a change in carrier in violation of statutory provisions or Commission rules. The Commission may assess a penalty of up to \$5,000 for each day a violation continues, up to a maximum of \$40,000 for the first offense and a maximum of \$110,000 for subsequent offenses. The amount of the penalty must be based on:

- The severity of the violation, including the intent of the violator, the nature, circumstances, extent and gravity of any prohibited acts:

- The history of previous violations;
- The amount necessary to deter future violations;
- Good faith attempts to comply after notification of a violation; and
- Such other matters as justice requires.

If consistent with the public interest, the Commission may also suspend, restrict or revoke a carrier's certificate so as to deny it the right to provide service in the State.

#### IV. EVIDENTIARY RECORD

The undisputed evidence presented at the hearing through both oral testimony and documents established the following facts regarding BOI's carrier change practices.

##### A. General

Beginning February 2002, the CAD received 183 complaints regarding unauthorized carrier changes by BOI. CAD notified BOI of each complaint and in February 2002 (as well as in March and July 2002) sent a letter to BOI's Vice President explaining its concern about deceptive marketing practices, stating that BOI was in violation of Commission rules, and specifying the administrative penalties that could result. The CAD received complaints for several months after BOI's initial notification. The CAD made findings of slamming in 167 of the complaints that included a total of 195 unauthorized carrier changes.<sup>1</sup> CAD notified BOI of these findings. BOI did not appeal CAD's findings.

In general, the evidence shows that BOI used deceptive tactics in marketing and third-party verification (TPV) procedures to induce Maine consumers to either unknowingly consent to a change in their carrier or to provide personal information that was used to make the change in carrier without the consumer's express consent. Moreover, BOI's marketing personnel intentionally misrepresented their identities and mislead consumers into believing that they were speaking to Verizon or AT&T personnel and that "Business Options" was merely a calling plan.

##### B. Specific Violations

###### 1. Invalid TPV Process

During the CAD investigation, BOI submitted 133 TPVs. Each of the submitted TPVs was in violation of Commission's rules and therefore constitutes a slamming violation. The violations are as follows:

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<sup>1</sup> Some complaints involved more than one violation.

- The third-party verifiers were not independent (in that a BOI affiliate paid the salaries of the verification entity's employees) and its employees were located in the same offices. Ch. 296, § 3(B)(3)(c)(e).
- The third-party verifiers combined the issue of the service to be changed with confirmation the person's authorization to make a carrier change and did not distinguish between interstate and intrastate service changes. Ch. 296, § 3(B)(D).
- The third-party verifiers failed to specify the name of the new carrier or that the customer's carrier was to be changed. Ch. 296, § 3(B)(3)(b).

## 2. Deceptive Practices

BOI used deceptive marketing and verification practices that contributed to 125 slamming violations. Specifically, BOI's telemarketers represented themselves as Verizon or AT&T employees calling to discuss switching to a lower cost plan, providing a single bill, or satisfaction with toll service. Customers were not made aware that the conversation had anything to do with changing their toll service to a new carrier. Thus, customers were not aware that affirmative responses subsequently given to the third-party verifier related to a change in carriers.

## 3. No TPVs

In addition to the 125 deceptive changes, BOI could not produce evidence of a TPV for 70 other carrier changes. Thirteen changes were made without a TPV; eight changes were made with a TPV that did not contain an affirmative response; and 49 "re-provisioned"<sup>2</sup> changes were made in which a TPV could not be produced.

## 4. Summary of Slamming Violations

In summary, the CAD received 183 slamming complaints against BOI and made 167 slamming findings (none of which were appealed). The Staff investigation revealed 195 unauthorized carrier changes. The 195 violations break down as follows:

- BOI submitted a total of 133 tapes. All of the tapes were violations due to the lack of independence of the verifier. Out of the 133 tapes, 125 had some type of affirmative response that was the result of deceptive practices (e.g. posing as Verizon or AT&T representatives) and 8 had no affirmative response at all.

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<sup>2</sup> Re-provisioned changes refer to the practice of submitting a second carrier change order after a recently acquired customer switches to another carrier. In this case, customers had returned to their original carrier after discovering that their carrier had been changed without authorization.

- In 62 cases, BOI did not provide any tape. The failures to provide tapes were violations for lack of verification. In 13 cases, there were no tapes in first instance and in 49 cases there were no tapes for re-provisioned carrier changes.

During the hearing, Staff represented that the maximum penalty for the 195 unauthorized carrier change orders by BOI would be \$19,430,000. However, Staff recommended the imposition of a \$750,000 penalty based on ten consumer complaints described in detail in the Report. The maximum penalty for the ten complaints would be \$890,000. In arriving at the \$750,000 recommendation, Staff generally considered the factors specified in the statute. It started with the maximum and allowed no reduction based on the severity of the violations, the intent of the violator and the gravity of the acts. However, Staff did allow some mitigation due to the lack of previous violations (although Staff did acknowledge the possibility that BOI may not have been operating in Maine prior to 2002) and the amount needed to deter future violations.

## **V. SANCTIONS**

The CAD has made specific findings that BOI has committed numerous violations of carrier change laws and regulations. Those findings are considered final for purposes of this proceeding. The issue before us is what, if any, sanctions should be imposed as a result of BOI's actions. Based on the record before us, we conclude that the violations were of a serious nature and warrant substantial sanction. Accordingly, we impose an administrative penalty of \$750,000 and revoke BOI's certificate to operate in Maine. In addition, we will refer this matter to the Attorney General for further action as may be appropriate. 35-A M.R.S.A. § 115(1)(D)

The administrative penalty we impose in this case is based on BOI's actions with respect to the ten customers specified in detail in the Staff Report. However, in determining the specific amount of the penalty, we consider the overall pattern and practices of BOI as established in the evidentiary record. In particular, BOI's violations continued after it was put on notice by the CAD that its activities were in violation of Maine law and regulations. In addition, the violations were not of a technical nature, but amounted to outright deception. This deception resulted from misrepresentations that likely constitute fraud, and reveal either intent to violate the law or, at a minimum, a conscious disregard of Maine's carrier change requirements. Upon a review of the totality of BOI's actions and the statutory factors that must be considered in assessing an administrative penalty, we order that BOI pay a penalty of \$750,000. BOI is ordered to pay this penalty on or before November 1, 2004. In addition, we find that the public interest requires that BOI's certificate to operate as a telecommunications carrier in Maine be revoked.

Accordingly, we

**ORDER**

1. That Business Options, Inc. pay an administrative penalty of \$750,000 on or before November 1, 2004. It shall pay the administrative penalty by certified check or money order payable to the Treasurer of the State of Maine, and send it to Administrative Director, Maine Public Utilities Commission, State House Station # 18, Augusta, ME 04333-0018;

2. That the certificate of Business Options, Inc. to operate as a telecommunications carrier in Maine, issued on May 28, 1996, is hereby revoked; and

3. That the General Counsel refer this matter to the Attorney General for further action as appropriate.

Dated at Augusta, Maine, this 27<sup>th</sup> day of September, 2004.

**BY ORDER OF THE COMMISSION**

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Diamond  
   Reishus

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.